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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JUAN GABRIEL CARDENAS, Defendant and Appellant.	B186925 (Los Angeles County Super. Ct. No. VA085513)

APPEAL from a judgment of the Superior Court of Los Angeles County, Phillip H. Hickok, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Juan Gabriel Cardenas appeals from the judgment entered following a jury trial that resulted in his conviction of aggravated sexual assault of a child (Pen. Code, § 269, subd. (a)(1)).[1] He contends: (1) he was denied due process as a result of the trial court's refusal to instruct on the lesser offense of committing a lewd or lascivious act upon a child under the age of 14 years (§ 288, subd. (a) (§ 288(a)); and (2) there was insufficient evidence to establish the force element of the charged offense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence adduced at trial established that on October 9, 2004, Vanessa C. lived in a one-bedroom one-bathroom apartment with her mother, sister and brother. At the time, her mother's boyfriend, defendant, also lived with them. Vanessa and her siblings slept on the floor in the living room while her mother and defendant shared the bedroom. Vanessa's mother allowed defendant to discipline the children, and defendant had hit Vanessa in the past. That day, which was the day after Vanessa's 12th birthday, her mother left for work while Vanessa was still asleep. Awakened by the door closing, Vanessa saw defendant enter the house and go into the bedroom wearing shorts and a sweater. A little while later, defendant came out of the bedroom wearing just a sleeveless white T-shirt and his boxers. Defendant took off the T-shirt and got on top of Vanessa, who was lying on her stomach. Vanessa asked defendant to get off of her and tried to push him off, but defendant used his weight to hold her down. Defendant removed his boxers and then removed Vanessa's shorts and underwear. Defendant turned Vanessa over so that she was lying on her back with her left arm pinned beneath her. When Vanessa tried to push defendant off with her right arm, defendant grabbed it and held it over her head by the wrist. Defendant put his penis into her vagina, and then moved up and down. Crying, Vanessa responded in the

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[1] All future undesignated statutory references are to the Penal Code.

negative when defendant asked if she liked it. When she said he was hurting her, defendant told her to "shhh." She tried to scream, but defendant told her again to "shhhh." Vanessa was afraid that he would hit her if she said anything. Defendant suggested that Vanessa go with him into the bedroom, but Vanessa refused. When defendant got off of Vanessa he used his T-shirt to wipe her vagina and then instructed Vanessa to put on her shorts and go into the bathroom and wipe herself.[2] Vanessa did as she was told. That day, Vanessa did not tell anyone what defendant had done to her because she was afraid he would hurt her; she did not tell her mother because she was afraid she would get in trouble.

The next day, when defendant left the house and Vanessa was alone with her siblings, she called her mother at work and told her what had happened. A friend of her mother's came to the house and brought Vanessa and her siblings to their grandmother's home. That day, Vanessa was examined at the hospital and her mother called the police.

Lori Berkemer, a nurse practitioner and sexual assault nurse examiner, testified that, upon examining Vanessa on October 10, 2004, she observed vaginal injuries indicative of forcible penetration.

Vanessa's 11-year-old sister, Adrianna, testified that, on the morning of October 9, 2004, she was half-awake when she heard defendant say to Vanessa: "Shhhh, you are going to wake up your brother and sister." Adrianna went back to sleep.

In a tape recorded interview on October 12, 2004, which was played for the jury, defendant initially denied having sex with Vanessa when confronted with the accusation by Detective Joseph Kirk of the Los Angeles Sheriff's Department. Eventually, defendant admitted it: "But, I – to me, it's like something I can't believe I even did it. Okay. You want me to say it here. Okay, I'll say it. Yes, I – I did it. [¶]

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[2] It was stipulated that various items of clothing were collected, including a sleeveless T-shirt, examined for semen and no semen was found on the clothing.

If you tell me to go and get the help, then, please go get me the help. I mean I don't want to break down in tears, because it does hurt." Kirk asked defendant: "Okay. Where did you put it? It was in her vagina, right? [¶] [THE DEFENDANT]: Yeah, I just – how do you say it? I just – well, I just grabbed [unreadable] and – and rub it around. That was it. [¶] [KIRK]: Okay. [¶] [THE DEFENDANT]: That was it. I didn't – [¶] [KIRK]: Did you put it – [¶] [THE DEFENDANT]: – go inside. [¶] [KIRK]: You – you didn't even put it inside her? [¶] [THE DEFENDANT]: No, I didn't even come inside of her. I didn't do none of that stuff. That, I honestly could tell you, I didn't do that."

Defendant was charged with aggravated sexual assault of a child (§ 269, subd. (a)(1)) based upon his having raped Vanessa (§ 261, subd. (a)(2) (§ 261(a)(2)). Following a jury trial, defendant was convicted as charged. The jury found true the allegations that (1) defendant raped Vanessa in violation of section 261(a)(2); (2) Vanessa was under the age of 14 at the time of the offense; and (3) defendant was more than 10 years older than Vanessa at the time. Defendant was sentenced to 15 years to life in prison. He filed a timely notice of appeal.

DISCUSSION

1. *The Trial Court Was Not Required to Instruct on Violation of Section 288(a) as a Lesser Related Offense of the Charged Offense*

Defendant contends he was denied due process as a result of the trial court's refusal of his request that the jury be instructed on section 288(a) as a lesser related offense to violation of section 269, subdivision (a)(1), the charged offense. Conceding that section 288(a) is not a lesser necessarily included offense of section 269, subdivision (a)(1), defendant nevertheless contends that the trial court should have instructed on section 288(a) as a lesser related offense.[3] We disagree.

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[3] In the trial court, defense counsel argued that one could not violate section 261, subdivision (a) without also violating section 288(a). But, in *People v. Benavides* (2005) 35 Cal.4th 69, 97, our Supreme Court held that, while the same evidence may

The former rule, announced in *People v. Geiger* (1984) 35 Cal.3d 510, was that, upon request, a criminal defendant had a state constitutional right to instructions on uncharged lesser related offenses supported by the evidence. (*Id*. at pp. 518-526.) But in *People v. Birks* (1998) 19 Cal.4th 108 (*Birks*), our Supreme Court held: "*Geiger* was wrong to hold that a criminal defendant has a unilateral entitlement to instructions on lesser offenses which are not necessarily included in the charge." (*Id*. at p. 136.) "[T]he new rule we announce today neither expands criminal liability nor enhances punishment for conduct previously committed. [Citations.] On the contrary, our holding merely withdraws the procedural opportunity for conviction of a *reduced* offense not encompassed by the accusatory pleading and selected solely by the defendant." (*Ibid*.)

Under *Birks*, the trial court properly refused defendant's request for instructions on lewd and lascivious conduct in violation of section 288(a) as a lesser alternative to the charged offense.

2. *There Was Substantial Evidence of Force*

Defendant contends there was insufficient evidence of force to sustain the conviction. He argues that the evidence that defendant held only Vanessa's right wrist establishes that defendant did not use any force that was substantially different from that necessary to accomplish the act. We disagree.

"[I]n order to establish force within the meaning of section [261(a)(2)], the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].

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be used to establish both lewd and lascivious conduct in violation of section 288(a) and rape in violation of section 261(a)(2), violation of section 288(a) is not a necessarily included offense within violation of section 261(a)(2). This is because a person can violate section 261(a)(2), a general intent crime, without harboring the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child that is an element of section 288(a).

[Citation.]" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023-1024, internal quotations omitted.)

Here, Vanessa's testimony that defendant held her right hand over her head while he used his weight to pin her to the ground with her left hand under her back, is sufficient to show that the act of sexual intercourse was against Vanessa's will.

DISPOSITION

The judgment is affirmed.

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RUBIN, J.

We concur:

COOPER, P. J.

FLIER, J.